

EXHIBIT I

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger**

Civil Action No. 17-cv-01545-MSK-MJW

APTIVE ENVIRONMENTAL, LLC,

Plaintiff,

v.

TOWN OF CASTLE ROCK, COLORADO,

Defendant.

JUDGMENT

PURSUANT TO the Court’s oral findings of fact and conclusions of law issued on March 22, 2018, judgment is hereby entered in favor of the Plaintiff, Aptive Environmental, LLC, and against the Defendant, Town of Castle Rock, Colorado, on the claims in this action. The Town of Castle Rock is permanently enjoined from enforcing Chapter 5.04.080(A)(4) of the Castle Rock Municipal Code, known as the “curfew” on solicitation activities. Costs are awarded to the Plaintiff pursuant to Fed. R. Civ. P. 54(d)(1).

Dated this 22d day of March, 2018.

BY THE COURT:



Marcia S. Krieger
Chief United States District Judge

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APTIVE ENVIRONMENTAL, LLC,

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TOWN OF CASTLE ROCK, COLORADO,

Defendant.

REPORTER'S TRANSCRIPT

ORAL RULING

Proceedings before the HONORABLE MARCIA S. KRIEGER,
Judge, United States District Court for the District of
Colorado, commencing at 10:00 a.m., on the 22nd day of March,
2018, in Courtroom A901, United States Courthouse, Denver,
Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
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A P P E A R A N C E S

JEREMY ALAN FIELDING and JONATHAN DAVID KELLEY,
Attorneys at Law, Lynn Pinker Cox & Hurst, LLP, 2100 Ross
Avenue, Suite 2700, Dallas, Texas 75201, appearing for the
Plaintiff.

STEVEN JAMES PERFREMENT, Attorney at Law, Bryan Cave,
1700 Lincoln Street, Suite 4100, Denver, Colorado 80203 ,
appearing for the Plaintiff.

BRIAN JAMES CONNOLLY and J. THOMAS MACDONALD,
Attorneys at Law, Otten, Johnson, Robinson, Neff & Ragonetti,
P.C., 950 Seventeenth Street, Suite 1600, Denver, Colorado,
80202, appearing for the Defendant.

* * * * *

P R O C E E D I N G S

(In open court at 10:00 a.m.)

THE COURT: We're convened today in
Case No. 17-cv-1545. This is encaptioned Aptive Environmental,
LLC v. The Town of Castle Rock. We're convened for purposes of
an oral ruling on a combined merits and motion for preliminary
injunction.

Could I have entries of appearance, please.

MR. PERFREMENT: Good morning, Your Honor. Steve
Perfrement for the plaintiff, Aptive Environmental. I also
have my co-counsel on the phone, Jeremy Fielding and Jonathan
Kelley.

1 THE COURT: Good morning.

2 MR. CONNOLLY: Good morning, Your Honor. Brian
3 Connolly for the Town of Castle Rock. With me at counsel table
4 is Heidi Hugdahl, Deputy Town Attorney, and Sally Misare, as
5 well.

6 THE COURT: Good morning.

7 I thank you all for coming in today for purposes of my
8 ruling and also for your presentation at the time of trial.

9 As you know, I'm doing an oral ruling in deference to
10 the parties, because the issues impact the solicitation season,
11 which comes with warm weather. And while we can't always
12 predict in Colorado when the warm weather is going to come,
13 there is the possibility it might be here. And, therefore, I
14 think you, as parties, deserve a definitive ruling so you know
15 what you're doing in the solicitation season of 2018.

16 I've had the opportunity to review all that was
17 submitted in conjunction with the trial, including the
18 arguments that were made both orally and in writing, and I
19 thank you for those.

20 The matter is before the Court following the bench
21 trial pertinent to the issue of whether Castle Rock's town
22 ordinance, 5.04.080(A)(4), that imposes a 7:00 p.m. curfew on
23 commercial solicitation constitutes a constitutionally
24 impermissible restriction of commercial speech. That is the
25 issue presented.

1 I'm going to refer to the plaintiff here as Aptive and
2 the defendant as the Town, even though, technically, its name
3 is Castle Rock.

4 Aptive contends that the curfew or ordinance is
5 unconstitutional, violating the First and the Fourteenth
6 Amendments of the United States Constitution, both facially and
7 as applied.

8 Now, the procedural posture of this determination
9 incorporates the plaintiff's motion for preliminary injunction
10 and the merits of the action which was consolidated for
11 purposes of trial by my order on October 10, 2017. Thereafter,
12 the parties conducted expedited discovery. The plaintiff
13 withdrew its claim for a monetary award and for a jury trial.
14 They filed cross motions for summary judgment, which were both
15 denied based on the existence of a genuine dispute of a
16 material fact requiring a trial.

17 As I said, I've had the opportunity to consider your
18 briefing; stipulated facts; those matters contained in the
19 approved Final Pretrial Order, Docket No. 105; briefing on the
20 standing issue; the testimony presented; the exhibits admitted,
21 to the extent that the parties have referred to them either in
22 argument or in examination of witnesses; and as I said, the
23 ruling is made orally in deference to the scheduling of the
24 solicitation season.

25 Aptive's claim is brought pursuant to 42 U.S.C.

1 Section 1983. And the parties agree that the Court's
2 jurisdiction to resolve issues under that section arises under
3 28 U.S.C. Section 1331. However, after the trial was
4 completed, the Town challenged Aptive's standing, stating that
5 it was not a solicitor subject to the curfew ordinance. The
6 Town's position was stated in a responsive brief to Aptive's
7 trial brief on the issue of standing. The Court treated the
8 Town's brief as a motion to dismiss brought under Rule 12(b) (1)
9 of the Federal Rules of Civil Procedure. And after allowing
10 Aptive the opportunity to respond, the Court denied the motion
11 by a text order. Now I take the opportunity to further
12 explicate my reasoning.

13 Standing is a jurisdictional issue. To have standing
14 to bring a constitutional challenge, a plaintiff must
15 demonstrate that it has or will suffer an injury in fact; that
16 there is a causal connection between the injury and the conduct
17 complained of; and it's likely that the injury will be
18 redressed by a favorable decision. Those three requirements
19 are set out in *Lujan v. Defenders of Wildlife*, at 504 U.S. 555,
20 a 1992 Supreme Court decision. These are all factual showings.

21 The Town's solicitation curfew that is at the heart of
22 this dispute prohibits solicitors from entering upon private
23 property between 7 o'clock p.m. and 9 o'clock a.m. unless
24 invited. Whether Aptive is a solicitor is a question of fact,
25 which the Town resolved in its stipulated facts in the parties'

1 scheduling order. They are found at paragraphs 4 and 5 of the
2 scheduling order.

3 Paragraph 4 states, "Plaintiff engages in activities
4 regulated by the Town of Castle Rock Ordinance No. 2013-43."
5 And Paragraph 5 states, "Aptive is a solicitor as defined by
6 Section 5.04.010 of the Town of Castle Rock Ordinance 2013-43."

7 These factual statements have never been withdrawn.
8 And although the Town has made legal arguments as to standing,
9 it has, consistent with these statements, repeatedly
10 acknowledged the Court's jurisdiction without reservation in
11 the pretrial order, in the motion for summary judgment, and in
12 arguments made at the time of trial.

13 Notwithstanding the late-made legal arguments to the
14 contrary, the Town's factual admission that Aptive is a
15 solicitor subject to the curfew ordinance establishes Aptive's
16 standing to challenge it. I therefore find that this court can
17 exercise its jurisdiction pursuant to 28 U.S.C. Section 1331.

18 Turning to the factual findings. The town is a
19 suburban residential community characterized by largely
20 single-family residential neighborhoods; it's a home-rule
21 municipality governed by a town council with seven members; its
22 laws are codified in the municipal code; and in 2017, it had a
23 population of approximately 58,000.

24 In 2008, the Town Council adopted Ordinance 2008-15,
25 which repealed and reenacted Chapter 5.04 of the municipal code

1 entitled "Canvassers, Hawkers, Peddlers, and Solicitors." This
2 chapter comprehensively addressed residential door-to-door
3 solicitation. And "solicitors" were defined to include those
4 that had both commercial and noncommercial purposes.

5 The ordinance required a number of things: It
6 required registration of all persons engaging in door-to-door
7 commercial activity with the City; it required a background
8 check prior to being authorized to solicit; it prohibited
9 commercial solicitors from entering property or remaining on
10 property that displayed a sign containing words such as "no
11 soliciting" or "no solicitors"; it prohibited registered
12 commercial solicitors from entering any private property that
13 was listed by the occupant on the Town's no-visit or no-knock
14 list; and, finally, it prohibited a registered solicitor from
15 entering private property after 7:00 o'clock p.m. and before 9
16 o'clock a.m.

17 All of these acts were punishable by imposition of a
18 fine of up to \$1,000, but subject to an affirmative defense
19 that the resident or occupant had expressly invited the
20 registered solicitor to enter his or her property.

21 The enactment history with regard to this ordinance is
22 limited, and particularly so with regard to the curfew
23 provision found at 5.04.080(A)(6).

24 The Town Council first addressed the question of its
25 policies with regard to door-to-door solicitation at its

1 August 21, 2007, meeting at the request of Councilman Ed
2 Rausch. Councilman Rausch had had an unexpected encounter with
3 a solicitor in his garage during daylight hours. Councilman
4 Rausch requested that the Town Clerk prepare a memorandum that
5 described the existing ordinance and the process used by the
6 police if its department received calls from town residents.

7 From Chief of Police Tony Lane and Sally Misare
8 received an e-mail with the information requested. The
9 e-mail, dated August 15, 2007, reported that during the year
10 2007, there were 13 reports or complaints about solicitors. Of
11 the thirteen, eight were door-to-door solicitors, and nine
12 involved summons for failure to have a license -- in other
13 words, no registration. One warning was issued.

14 The memorandum also stated that there could have been
15 20 to 30 other solicitor complaints, but not all door-to-door,
16 where no report or contact was made. It states "Unfortunately,
17 these calls do not make it into the system, so we have no way
18 of identifying the exact number." And then it follows with a
19 statement that, "Most citizens who call report feeling
20 uncomfortable, they think solicitors are suspicious. Several
21 citizens report they have been harassed or intimidated by
22 solicitors. And on occasion, citizens report that they fear
23 that the solicitor may be using a sale of products or goods in
24 order to case the area for future burglaries."

25 The memo also explains what the City's policy was with

1 regard to solicitor complaints. Its enforcement mechanism was
2 described by the chief of police, who states, "If an officer
3 contacts a solicitor, either by complaint or officer initiative
4 activity, the subject is checked for a license and then checked
5 for warrants through NCIC and CCIC. If they have" -- "if they
6 have a warrant, they go directly to jail. If the solicitor
7 does not have a license in his or her possession, they're
8 advised to immediately stop soliciting, issued a summons or
9 warning, and advised to contact the Town Clerk's office."

10 The Town Council also received a memo from assistant
11 Town counsel identifying the factors that courts have
12 considered in determining the constitutionality of solicitation
13 restrictions. But it was brief and ultimately supported by a
14 much more detailed memo, which I will refer to in a moment.

15 The Town Council in response formed a working group --
16 or directed formation of a working group; directed that group,
17 comprised of representatives from the Town Attorney's Office,
18 the Town Manager, the police department, the Town Clerk, to
19 research means to address door-to-door solicitation issues.
20 The Town Council considered restrictions as to solicitors at
21 four subsequent Town meetings; but over the time period of
22 those four meetings, only three additional pieces of
23 information were presented to the Town Council. The first was
24 in a report by the working group that said "A complaint about a
25 solicitor in a neighborhood at 9:45 p.m.," with no explanation

1 and no description beyond that brief ambiguous reference.

2 The second was an undated legal memorandum prepared by
3 two lawyers at the law firm of Hayes, Phillips, Hoffman and
4 Carberry, PC, for the Colorado Municipal League. Sometimes
5 this is referred to as a white paper; but for purposes of this
6 ruling, I'll simply call it a memorandum. It was a legal
7 memorandum that described the case law addressing various means
8 used to regulate door-to-door solicitation. They included
9 total bans; permitting; time restrictions -- also referred to
10 as curfews; opt-in and opt-out lists; identification; bonding;
11 fingerprinting; background checks; permit licensing fees; door
12 hangers and menus; and no solicitation signs. It also
13 contained a chart which categorized the type of regulation and
14 whether it was constitutional or not in a commercial or
15 non-commercial context.

16 Interestingly, although the curfew was listed as
17 constitutional in the chart if used in a commercial context,
18 the text describing curfews and time restrictions included only
19 decisions where the time restrictions and curfews were found
20 unconstitutional.

21 Based on the discussions within the working group --
22 which are unmemorialized and for which the Court has no
23 evidence other than the testimony presented -- the Town Clerk
24 recommended that the Town Council adopt most of the regulations
25 that the chart in the memo designated as constitutional.

1 With regard to a curfew, the recommendation states,
2 "Additionally, restrictions on the times during which
3 solicitation may occur have been provided and were written in
4 order to meet constitutional requirements for definiteness and
5 reasonableness. It is our opinion that the times provided,
6 7:00 p.m. to 9:00 a.m., provide a reasonable balance for
7 residents and solicitors." No further evidence or explanation
8 is provided.

9 Prior to the February 26 meeting, the Council received
10 a memo from the town attorneys, referring to the memo prepared
11 by the Colorado Municipal League and its chart, recommending
12 regulation of commercial solicitation, including
13 no-solicitation signs, a no-knock list, charge for sales tax
14 deposit, background check prior to permitting or licensing, and
15 the curfew.

16 Council members had a brief discussion as to the
17 cutoff time for a curfew for commercial solicitation, noting
18 that some courts overturned cutoffs at 6 o'clock p.m., but
19 others found cutoffs at 8 to 9 o'clock p.m. to be reasonable.
20 The minutes reflect that one Council member suggested 7:00 p.m.
21 as a compromise, because 8 o'clock was too late in the winter.
22 This became the subject of a motion directing staff to prepare
23 an ordinance restricting the commercial solicitation and
24 non-commercial solicitation as recommended, including a curfew
25 time period of 7:00 p.m.

1 The proposed ordinance was considered, then, at the
2 meeting on March 25 and April 8, 2008. Its first reading and
3 second reading do not reflect any further discussion as to the
4 merits of the proposal. The ordinance as adopted contains no
5 express justification for a curfew. Several of the
6 justifications for the entire ordinance's repeal and
7 reenactment address crime. But four out of five of those
8 paragraphs that reference justification of public safety have
9 no factual basis reflected in any of the pre-enactment history.

10 They are, "Whereas, a significant percentage of the
11 reported criminal activity of the Town of Castle Rock during
12 2006 and 2007 involved uninvited access to private property,
13 including theft, burglary, criminal mischief, and trespass."
14 There is no reference in the record before the Court as to
15 where that fact came from, and the evidence presented at trial
16 indicates an ambiguity as to its source.

17 "Whereas, some persons are known to pose as
18 door-to-door solicitors in an effort to engage in criminal
19 activity and illegal entry onto private property." Again, no
20 source for that information in the pre-enactment history.

21 "Whereas, criminal activity on private property often
22 occurs during nighttime hours." Again, no evidence to support
23 that statement in the pre-enactment record.

24 And, "Whereas, the Town Council finds and determines
25 that unregulated door-to-door solicitation within the town

1 would present a danger to town residents and their private
2 property, especially where residents are alone or absent when
3 persons gain or seek to gain entrance onto their property or
4 into their homes." There is no evidence that this had occurred
5 in the town in the pre-enactment history.

6 In 2014, the ordinance was again amended at staff
7 suggestion. The primary change in the ordinance was a
8 distinction between solicitors and canvassers. Solicitors were
9 commercial solicitors, and canvassers were non-commercial
10 solicitors. The ordinance expanded the nature of the
11 background check, the grounds for denial, and required
12 solicitors to wear identifying badges. There was no change to
13 the curfew provisions and no record indication of any facts or
14 any evidence considered for that change.

15 In 2017, Aptive, a pest control services company,
16 sought to conduct door-to-door solicitation for its services in
17 the town. Door-to-door solicitation is its only marketing
18 device, and it is the most successful pest control company in
19 the country. In 2017, through door-to-door solicitation,
20 Aptive sold more than 200,000 customers annual pest service
21 agreements through door-to-door solicitation.

22 The time of day for the solicitation is critical.
23 Most successful sales occur in a period of time after 7 o'clock
24 p.m., when residents are home from work and both residents in a
25 household can confer with the salesperson and each other.

1 Aptive obtained permits for salespeople in the town
2 and abided by the curfew in August of 2017. Aptive also
3 engaged in door-to-door solicitation in the Denver metro area,
4 where there was no 7:00 p.m. curfew.

5 Between August 5 and August 12, 2017, there were 49 to
6 55 sales in Castle Rock; but the rate of sale was twice as many
7 in the Denver metropolitan area as in the Town of Castle Rock.
8 Aptive attributes that to the fact that it could not engage in
9 door-to-door solicitation after 7 o'clock p.m.

10 The current evidence of justification for the curfew
11 portion of the ordinance adds little more. As of 2017, the
12 ordinance had been in effect for nine years. There was a
13 prominently displayed no-knock list or to participate on the
14 no-knock list, but most residents were not on the list.
15 Residents were provided with signs and stickers that they could
16 use to dissuade solicitors; and there was registration of all
17 commercial solicitors, as well as a requirement that they wear
18 an official badge designating them as such.

19 Each solicitor was required to fill out a solicitation
20 application with the Town. Upon registration, when the
21 solicitor collected the permit, the solicitor was given a
22 physical copy of the checklist, which included an explanation
23 of the no-knock list; an advisement to look online for updates
24 to the list; and solicitors are also advised that even if
25 residents did not choose to display a no-knock sticker,

1 solicitors should not knock on the doors of those homes. The
2 solicitor was also given a certificate of registration that
3 advised solicitors of the town that they were not authorized to
4 engage in solicitation between the hours of 9:00 a.m. and 7 --
5 they were authorized to engage in solicitation between the
6 hours of 9:00 a.m. and 7:00 p.m., but they were not authorized
7 to engage in solicitation after 7:00 p.m. and before 9:00 a.m.

8 Because the Town does not require canvassers to
9 register, it has no record of the number of canvassers that go
10 door to door; it has no record of the number of registered
11 solicitors, as compared to canvassers; and it does not know how
12 many canvassers are soliciting at any point in time.

13 Furthermore, it does not track the number or percentage of its
14 residents who are home prior to or after 7 o'clock p.m. No
15 surveys have been conducted as to the residents' view of the
16 curfew ordinance or any other provision of the ordinance
17 affecting commercial solicitation.

18 The Town has no records of any crime being -- either
19 property or personal crime being committed by a solicitor since
20 2008. In 2016 and 2017, there were a total number of 86
21 complaints made to Castle Rock's police dispatch center about
22 solicitation. More than half of those, 44, had no
23 classification as to whether there was a solicitor or a
24 canvasser involved. As to solicitors, there was only one
25 complaint about registered solicitors, twenty-two complaints

1 about unregistered solicitors, and no complaints about
2 solicitors soliciting after 7 o'clock p.m. As to canvassers,
3 there were 16 complaints about canvassers and 11 complaints
4 about canvassers soliciting after 7 o'clock p.m.

5 According to the Town's current chief of police -- who
6 has an illustrative career of more than 32 years in law
7 enforcement -- door-to-door solicitation is not a law
8 enforcement issue for the Town. The police track data in many
9 respects; but this is such a low priority issue, there is
10 little data maintained.

11 The chief is unaware of any data that correlates a
12 propensity of a solicitor to commit crimes or correlates the
13 likelihood of crime as occurring after 7:00 p.m., as compared
14 to an earlier time. Indeed, his testimony was that if there is
15 a problem with solicitation, it is with unregistered
16 solicitors, which tracks the information from the dispatch
17 calls.

18 Contrary to the initial justification for the
19 ordinance, he testified that crimes are more likely to be
20 committed during daytime hours rather than at night because
21 more people are away from their homes during daytime hours. To
22 the extent that there is an issue with regard to crime, it is
23 attributable to registration, or lack thereof. There are no
24 incidents correlating violation of the curfew with any crime.
25 There are no studies as to the effect of the curfew on

1 residents' perceptions. The lack of a curfew would not have
2 any material impact upon public safety or crime prevention.
3 Its primary impact is as to fears of the public as nighttime
4 hours progress. In other words, as he says, people get more
5 anxious as it gets dark. The primary benefit of the curfew
6 really is in its precise temporal delineation of 7:00 p.m. And
7 that only is a benefit to enforcement of the curfew and to
8 public perception. It does not tie to public safety or crime
9 prevention.

10 Lay witnesses have testified about public perception
11 of the need for a curfew. The mayor, Mayor Green, recited two
12 instances of being frightened by solicitors during daytime
13 encounters. She said she talked to neighbors and friends who
14 do not like solicitors and generally support regulation. But
15 her testimony offered no specifics as to the content of any
16 conversations and whether the participant addressed the need
17 for benefit of a curfew.

18 We turn, then, to the law that applies to these facts.
19 As I noted, Aptive brings this action pursuant to 42 U.S.C.
20 Section 1983. It seeks a declaratory judgment that the Town's
21 solicitation curfew ordinance is unconstitutional under the
22 First and Fourteenth Amendments to the United States
23 Constitution, both facially and as applied. The distinction
24 between facial and as-applied challenges is not as well defined
25 as some might like. And that's particularly true in First

1 Amendment challenges, such as this, where the transcendent
2 value to all society of constitutionally protected expression
3 is deemed to justify allowance of attacks on overly broad
4 statutes with no requirement that the person making the attack
5 demonstrate that his own conduct could not be regulated by a
6 statute drawn with the requisite narrow specificity.

7 The standard applied in both circumstances -- the
8 circumstances of facial attack and also as-applied -- are
9 reflected in two Supreme Court decisions, *Citizens United v.*
10 *FEC*, at 558 U.S. 310, a 2010 decision, and *Gooding v. Wilson*,
11 at 405 U.S. 518, a 1972 decision.

12 In this case, because the curfew is challenged on its
13 face as an unconstitutional restriction of commercial speech,
14 Aptive has the burden to establish that no set of circumstances
15 exist under which the curfew would be valid. And that standard
16 is set out in *United States v. Salerno*, at 481 U.S. 739, a 1987
17 decision.

18 The first issue that the Court encounters on -- in its
19 legal analysis is whether the curfew regulates speech. Before
20 addressing the merits of Aptive's arguments, the Court must
21 take a diversion to address this argument, which was late
22 brought by the Town.

23 The Town concedes that the curfew ordinance regulates
24 speech in a number of its filings, including the Proposed Final
25 Pretrial Orders and the Final Pretrial Order, No. 105, that the

1 Court adopted. But nevertheless, the Town in closing argument
2 following the trial raised the question as to whether the
3 ordinance regulates conduct or speech.

4 It reads, "No solicitors shall enter upon private
5 property within the town after 7:00 p.m. and before 9 o'clock
6 a.m." The Town contends that the ordinance merely limits the
7 solicitor from walking up to a resident's door -- which would
8 be conduct -- and it does not limit what the solicitor might
9 say -- which is speech. The Town urges too narrow a reading of
10 the ordinance, I believe, both under its express language and
11 under established jurisprudence.

12 First, turning to the ordinance -- and, here, I refer
13 to the entire ordinance affecting solicitation -- the
14 purpose -- espoused purpose in its preamble is to "adopt a
15 regulatory program" in furtherance of the espoused goals and
16 purposes. Among the goals and purposes espoused are the
17 interests of the Town and the public being accommodated by a
18 regulatory scheme that permits commercial solicitation during
19 reasonable daytime and evening hours. Thus, the purpose of the
20 curfew, as articulated in the ordinance, is to regulate
21 commercial speech during particular hours. Notwithstanding the
22 fact that it states in the curfew provision that the solicitor
23 may not enter upon private property, the espoused intention for
24 this provision is to regulate speech.

25 It is long established that commercial solicitation is

1 a form of speech subject to the First Amendment. And like all
2 speech, it is circumscribed to oral utterances. That was
3 recognized in *Edenfield v. Fane* by the Supreme Court in 1993,
4 found at 507 U.S. 761. But speech also incorporates writings,
5 means of dispensing information, such as publication, and
6 dissemination of information. And, thus, the right to speak is
7 implicated when the information that a person possesses is
8 subject to restraints on the way the information may be
9 disseminated.

10 This is reflected in a multitude of decisions,
11 including *Seattle Times Company v. Rhinehart*, 467 U.S. 20, a
12 1984 Supreme Court decision; *Bartnicki v. Vopper*, at 532 U.S.
13 514, a 2001 Supreme Court decision. And as noted by the
14 Supreme Court in *Sorrell v. IMS Health, Inc.*, found at 564 U.S.
15 552, a 2011 decision, a law prohibiting trade magazines from
16 purchasing or using ink was considered to be an infringement of
17 speech because the ink would have been used in the publication
18 of the speech.

19 Curfews have long been regarded as burdens on
20 commercial speech. *Watseka v. Illinois Public Action Council*,
21 796 F.2d 1547, a Seventh Circuit 1985 decision; as well as *New*
22 *Jersey Environmental Federation v. Wayne Township*, at 310
23 F.Supp.2d 681, a District of New Jersey 2004 decision; as well
24 as *Ohio Citizen Action v. City of Mentor-On-The-Lake*, 272
25 F.Supp.2d 671, a Northern District of Ohio 2003 decision; as

1 well as *Alternatives for California Women, Inc. v. County of*
2 *Contra Costa* in a California Court of Appeals decision in 1983.

3 Likely, such treatment is rooted in the commonsense
4 notion that a door-to-door solicitor is barred from approaching
5 a resident's front door only if the implicit license has been
6 revoked. The nature of that license is referred to in a
7 criminal decision of *Florida v. Jardines*, 569 U.S. 1, a 2013
8 Supreme Court decision. And there, the Supreme Court wrote as
9 follows: "A license may be implied from the habits of the
10 country, notwithstanding the strict rule of English common law
11 as to entry upon a close. We have accordingly recognized that
12 the knocker on the front door is treated as an invitation or a
13 license to attempt an entry justifying ingress to the home by
14 solicitors, hawkers, and peddlers of all kinds. This implicit
15 license typically permits the visitor to approach the home by
16 the front path, knock promptly, wait briefly to be received,
17 and then -- absent invitation to linger longer -- leave.

18 "Complying with the terms of that traditional
19 invitation does not require fine-grained legal knowledge. It
20 is generally managed without incident by the nation's Girl
21 Scouts and trick or treaters. Thus, a police officer not armed
22 with a warrant may approach a home and knock, precisely because
23 that is no more than what any private citizen might do."

24 Finding, then, that the curfew ordinance regulates
25 commercial speech, the Court turns to the legal standard for

1 assessing the permissibility of that regulation. The parties
2 agree that the standard to be applied is set out in *Central*
3 *Hudson Gas & Electric Corporation v. Public Service Commission*,
4 in the Supreme Court decision found at 447 U.S. 557, issued in
5 1980. That decision has a four-prong test.

6 The first prong is of no issue here. The first prong
7 requires that the speech at issue be lawful and not misleading.
8 Here, the parties agree that Aptive's speech is such. But then
9 there are three requirements that the Town bears the burden of
10 establishing. First, that the Town is serving a substantial
11 interest; second, that the regulation directly and materially
12 achieves the Town's interest; and, third, that the regulation
13 is narrowly drawn and not more extensive than is necessary to
14 serve that interest.

15 Turning to the first of these three elements, the
16 substantial interest element. The parties agree that Castle
17 Rock's two proffered interests are substantial. They're
18 legitimate governmental interests. The two interests that are
19 proffered are public safety and prevention of crime and
20 ensuring citizens can maintain undisturbed privacy in their
21 home.

22 The second element under *Central Hudson* examines the
23 degree to which the regulation advances these governmental
24 interests. The Town must demonstrate that the harms it recites
25 are real and that its restriction will, in fact, alleviate them

1 to a material degree. That's the teaching found in *Florida Bar*
2 *v. Went for It, Inc.*, 515 U.S. 618, a 1995 decision. And this
3 element inherently has two components, although the Supreme
4 Court has noted that they're not entirely discrete. The two
5 components are the existence of a harm and the effectiveness of
6 the regulatory solution to address it.

7 In applying these standards, the Court focuses solely
8 on the curfew ordinance -- not the panoply of other
9 restrictions that apply to solicitors, solely the curfew
10 ordinance -- and how well it addresses the harms that the Town
11 establishes.

12 Turning first to the interests of privacy. The Court
13 finds that the Town has demonstrated that there is a privacy
14 interest in preventing doorbell rings at residences after
15 7:00 p.m., but it has not established that the solicitation
16 curfew alleviates intrusions into residents' privacy to any
17 material degree.

18 As an abstract matter, protection of the privacy of
19 the home is recognized in many cases and by the Supreme Court
20 as being of the highest order of importance for municipalities
21 to protect. The privacy right at issue here is identified by
22 anecdotal evidence. Lay witnesses have expressed their desire
23 to focus on family and recreational activities in the evening
24 hours without the intrusion of doorbell interruptions. They
25 have testified that they do not want to be disturbed after

1 7:00 p.m., when they have returned from a working day, are
2 enjoying family time, or attending to children's activities.
3 And based on this showing, the Court finds that the privacy
4 interest associated with the curfew ordinance is freedom from
5 doorbell interruptions after 7 o'clock p.m.

6 Although the Court respects the preferences expressed
7 by these witnesses, it has some doubt as to whether this
8 privacy interest is real, in the sense that it is or was
9 significant or widespread. The standard for showing a real
10 interest is best articulated in the Supreme Court decision of
11 *Lorillard Tobacco Company v. Reilly*. *Lorillard* is found at 522
12 U.S. 525, a 2001 Supreme Court decision. And it explains that
13 the burden of showing that the restriction advances the
14 government interest is not satisfied by mere speculation or
15 conjecture; rather, a governmental body seeking to sustain a
16 restriction on commercial speech must demonstrate that the
17 harms it recites are real and that its restriction will in fact
18 alleviate them to a material degree.

19 It goes on to state that "We do not, however, require
20 that empirical data come accompanied by a surfeit of background
21 information. We have permitted litigants to justify speech
22 restrictions by references to studies and anecdotes pertaining
23 to different locales altogether, or even, in a case applying
24 scrutiny, to justify restrictions based solely on history,
25 consensus, and simple common sense."

1 The Tenth Circuit interprets the standard to mean that
2 a regulation must do more than provide ineffective or remote
3 support for a governmental purpose. That's found in *Mainstream*
4 *Marketing*, at 358 F.3d 1228, a Tenth Circuit 2004 decision.

5 At trial, the Town argued that although there were not
6 wide-based studies, analytical data, or a long list of examples
7 in the legislative history behind this ordinance, that the
8 Court should find that the anecdotal evidence with regard to
9 the privacy interest is sufficient. The Court has a problem
10 with that, because there is not much of anything in the record
11 at all with regard to this privacy interest.

12 Councilman Rausch's experience didn't occur during
13 evening hours. There is only one incident that is referred to
14 in the material submitted to the Council, and that's an
15 ambiguous complaint about a solicitor being in a neighborhood
16 at 9:45 p.m. There is no record of the Council's discussions
17 about the purpose of the curfew. The only discussion about the
18 curfew appears in the records of February 22, 2008. Indeed, it
19 appears that the curfew concept arose not from anecdotal or
20 other evidence, but, instead, from the Council of Governments'
21 memo listing regulations that it characterized as permitted.

22 Subsequent to the ordinance's enactment, there is
23 little evidence of a widespread or significant interest in
24 eliminating doorbell interruptions after 7:00 p.m. There have
25 been only 11 complaints about doorbell contact after 7:00 p.m.;

1 and this was due to canvassers, not solicitors. None of the
2 lay witnesses testified about incidents involving solicitors in
3 the evening. And although lay witnesses testified that their
4 neighbors and friends shared their perspective that this would
5 be beneficial, there is no evidence that such incidental
6 conversations are representative of the 56,000 people in the
7 town.

8 Indeed, this showing is in direct contrast with the
9 showings that have been made in other cases. The amount of
10 support that is relevant in defining the harm has been
11 addressed by a number of courts. And it's important to note
12 that the sufficiency of that information is persuasive both as
13 to the existence of the harm and also in determining whether
14 the regulation materially alleviates the harm.

15 So, for example, one can look to the *Association of*
16 *Community Organizations for Reform Now v. the Town of East*
17 *Greenwich*, 239 Fed.Appx. 612. This was a District of Rhode
18 Island decision in 2006. And, there, the question about a
19 7:00 p.m. curfew was at issue. The curfew applied both to
20 commercial solicitors and non-commercial canvassers. But the
21 facts that were important to the Court included that there had
22 been a 9 o'clock curfew, and there had been many complaints by
23 residents that that curfew time was too late, and, instead, it
24 should be moved back to 7 o'clock.

25 In *New Jersey Citizen Action v. Edison Township*, 797

1 F.2d 1250, a Third Circuit 1986 case, the Court noted that many
2 residents did not object to solicitors and, indeed, some warmly
3 received solicitation in the evening hours. Here, the record
4 is sparse as to evidence about the curfew. Instead, it appears
5 to be the tail of the dog -- the dog being all of the
6 comprehensive restrictions that were adopted by the Town in
7 2008.

8 But given the presumption of privacy in one's own home
9 and the low standard for an adequate showing of the right to be
10 protected, I will assume that the Town's showing as a
11 protectable privacy interest is sufficient. Whether the curfew
12 accomplishes this objective, however, leads to an entirely
13 different conclusion.

14 Under the ordinance, only solicitors -- not
15 canvassers -- are subject to curfew restrictions. That means
16 that canvassers can ring doorbells after 7 o'clock p.m.
17 Indeed, the Town's own statistics indicate there have been
18 complaints about canvassers doing exactly that. The Town has
19 presented no evidence, nor can it, as to the comparative
20 numbers of solicitors and canvassers or as to the times when
21 they are most active or would like to be most active. Thus,
22 there can be no comparative measure of the effectiveness of the
23 curfew in protecting residential privacy after 7:00 p.m.
24 Although elimination of solicitor calls after 7:00 p.m. may
25 advance the purpose of protecting the residents' privacy

1 interest without quantification of how exposed they are to the
2 very same contact by canvassers, the Court cannot conclude that
3 the curfew has any material effect in advancing the protection
4 of the privacy rights.

5 This finding is consonant with that found by the
6 District Court, Court of Appeals, and Supreme Court in the *City*
7 *of Cincinnati v. Discovery Network*, found at 507 U.S. 410, a
8 1993 decision. In *Cincinnati*, the courts addressed the
9 constitutionality of a ban on news racks containing commercial
10 handbills, but which did not apply to news racks that contained
11 newspapers. The City offered a legitimate interest in safety
12 and aesthetics to justify the ban, but all three courts found
13 that the City did not establish a fit between the articulated
14 interest and its choice of selective prohibition of news racks.

15 The Supreme Court stated, "The benefit to be derived
16 from the removal of 62 news racks, while about 1,500 or 2,000
17 remain in place, was considered minute by the District Court
18 and paltry by the Court of Appeals. We share their evolution
19 of a lack of fit between the City's goal and its means of
20 achieving it."

21 Here, the burden is on the Town to show how the curfew
22 that affects only solicitors materially protects residents'
23 privacy rights. Because the privacy rights continue to be
24 infringed by canvassers, and there is no way of comparing the
25 number of canvassers or the number of solicitors that might

1 impact the doorbell, the Court cannot find that there is an
2 appropriate fit or a material benefit for that purpose. Thus,
3 the curfew does not materially advance the Town's interest in
4 protecting residents' privacy after 7:00 p.m.

5 We turn to the second justification, public safety and
6 crime prevention. Crime prevention and public safety are
7 legitimate governmental concerns in the abstract sense, as
8 well. But there is even less evidence that there is a real
9 harm to be addressed, as compared to a hypothetical harm or a
10 feared harm. Put another way, there is no evidence that
11 commercial solicitation after 7:00 p.m. would increase crime or
12 decrease public safety. And due to the lack of a demonstrable
13 harm in the absence of a curfew, it follows that there is no
14 evidence that the curfew materially advances the purpose
15 espoused.

16 At the time of the adoption of the curfew ordinance,
17 the Town Council had no evidence before it to correlate any
18 crime arising from commercial solicitation, much less any crime
19 arising from commercial solicitation after 7:00 p.m. As I
20 noted earlier, there was only one reference to an evening
21 incident with a solicitor, and that involved no crime. The
22 initial memo from the police chief contains no information
23 about crime related to solicitation.

24 And with regard to the prefatory whereas clauses,
25 there was no factual basis to support them. In particular, the

1 two that pertained to the curfew, that some persons are known
2 to pose as door-to-door solicitors in an effort to engage in
3 criminal activity and illegal entry onto private property, and
4 that the criminal activity on private property often occurs in
5 the nighttime hours.

6 In 2018, ten years later, despite modern policing and
7 data collection methods, there is still no evidence that
8 correlates commercial solicitation after 7:00 p.m. with an
9 increase in crime or a decrease in public safety. The chief of
10 police testified that most crimes occur during the daytime
11 hours. In his 32-year career, he has once heard of a criminal
12 posing as a solicitor, but he can't think of the specific
13 incident, and the Town has no data that demonstrates that it
14 has ever occurred. The Town has no record of any commercial
15 solicitor having been charged or convicted of a crime related
16 to property or person, it has no records that commercial
17 solicitation occurs to any criminal activity whatsoever, and
18 there is no data suggesting that commercial solicitors tend to
19 commit crimes more frequently after 7:00 p.m. as compared to
20 any other time.

21 The Court therefore finds that the record is actually
22 devoid of evidence showing that commercial solicitation after
23 7:00 p.m. causes a real harm in the form of increased crime or
24 decreased public safety.

25 Turning to the effect of the curfew. The Court notes

1 that the chief of police testified that solicitation has little
2 effect on crime in the town, that the utility of the curfew
3 ordinance from a law enforcement perspective is simply in its
4 simplicity of defining when the curfew goes into effect and
5 perhaps in making the population feel safer.

6 The inadequacy of this evidence is stark compared to a
7 case that the Town has relied on in its briefing, *Vivint*
8 *Louisiana, LLC v. The City of Shreveport*. That is found at 213
9 F.Supp.3d 821. It's a 2016 case. And it concerned an
10 anti-solicitation ordinance that actually was found to be
11 constitutional, but it was found to be constitutional based on
12 an evidentiary showing of statements from Deputy Chief
13 Huddleston, who was the deputy chief of police in Shreveport.
14 And he explained that he had been the deputy chief since 2012,
15 but he had worked continuously for the Shreveport Police
16 Department since 1984; that he reviewed on a weekly basis
17 information regarding the types of criminal activity occurring
18 within the City of Shreveport; that he was familiar with the
19 ordinance; and he went on to detail at great length his
20 assessment that criminals approach residences and knock on the
21 door in order to determine whether the resident is at home, and
22 by doing so, they gather information about how to enter the
23 residence then or at some other time; that the Shreveport
24 Police Department maintains statistics on burglaries, and it is
25 a significant amount of the criminal activity in Shreveport;

1 that in 2014, there were 2,095 burglaries reported to the
2 department and that the department attributed a reduction from
3 the 6,400 burglaries in 1990 to this particular ordinance.

4 This is the kind of information that demonstrates the
5 correlation between the solicitation ordinance and public
6 safety. As he says, "If the door-to-door solicitation
7 ordinance was not available, then I am certain it would have a
8 significant impact on the effectiveness of law enforcement in
9 preventing criminal activity, including burglaries and home
10 invasion crimes, and will make it more difficult to control
11 criminal activity."

12 In the town, the residents are surveyed as to whether
13 they consider themselves to live in a safe environment, and
14 they say they do. And there is no evidence, such as in
15 *Shreveport*, that they are falling victim or have fallen victim
16 or might fall victim to a widespread risk of crime due to
17 solicitation.

18 Viewing the curfew as a singular restriction has its
19 limits, because it is likely the result of the other pieces of
20 the solicitation ordinance that help keep the citizens safe --
21 registration of solicitors, wearing of badges, no-knock list,
22 and posting of signs. And that is why Chief Cauley can say
23 that doing away or changing the curfew would have very little
24 effect on crime in the town.

25 Now, that leads me to the conclusion that the Town has

1 not established that the curfew materially impacts the
2 legitimate objectives of reducing crime and promoting public
3 safety. But before I conclude, I want to address something
4 that underlies this case from my review of the evidence; and
5 that is that the primary justification for the extensive
6 revision of the City's ordinances with regard to door-to-door
7 solicitation was a generalized feeling of distrust of
8 solicitors, and that this distrust has continued through the
9 current day. And with regard to evening solicitation, it is
10 coupled by natural anxiety of residents as darkness approaches.

11 Councilman Rausch's encounter with the solicitor in
12 his garage and Mayor Green's encounters with solicitors were
13 frightening, but they were daytime encounters. They were not
14 nighttime encounters. But they're understandable. And when
15 you add them to Chief Cauley's observation that as it gets
16 later in the evening, people are a little bit more anxious, the
17 concerns about commercial solicitation are understandable. But
18 they're also highly subjective, and they're not tethered to any
19 facts. Put simply, these are emotionally driven perceptions
20 that do not neatly fit within the traditional governmental
21 interests of preserving privacy and fostering public safety.
22 Instead, they're a bit ephemeral.

23 And Chief Cauley characterized these as a perception
24 of safety or being related to a perception of safety. That's
25 as good a description as I can think of.

1 I also note that although the curfew is viewed as a
2 discrete restriction on commercial speech for purposes of this
3 matter, it is just simply one of the laundry list of regulatory
4 tools that the Town adopted in 2008 to address this perception
5 of safety. Indeed, the primary reason the curfew was enacted
6 was not because of its unique role in regulating door-to-door
7 solicitation, but because it was on the menu of permissible
8 restrictions that the Council of Governments' memo identified.
9 Essentially, it appears that the Town enacted the curfew
10 because it could, not because it needed to. Under these
11 circumstances, the justification for the curfew becomes even
12 more ephemeral: We fear and dislike commercial solicitors, and
13 a curfew is one way to regulate them.

14 The Court recognizes that the Town has not
15 characterized the justification of perception of safety as a
16 legitimate governmental interest and that Aptive has tried to
17 distinguish itself as a registered solicitor from the bad-actor
18 unregistered solicitors who flaunt the law. But if the Court
19 were to assume that perception of safety, as ephemeral as it
20 is, is a permissible justification for regulation, then the
21 Court would have to ask the second question: What is the fit
22 between the curfew and the perception of safety?

23 And in that regard, the Court finds the same problem
24 that it did with the privacy interest. Perception of safety
25 necessarily is linked to a stranger coming to your door and

1 ringing the doorbell. And to the extent it's related to a
2 nighttime anxiety, it's a stranger coming to the door ringing
3 the doorbell at night. And it matters very little whether that
4 stranger is a solicitor or a canvasser, insofar as perceptions
5 of safety are concerned. And so, absent adequate information
6 to measure the effect of excluding solicitors from ringing the
7 doorbell while you allow canvassers to do so, prevents the City
8 from establishing a materially beneficial impact of the curfew.

9 Because the Court finds that no legitimate
10 governmental interest is materially advanced by the Town's
11 solicitation curfew, it's not necessary to address the third
12 prong of the *Central Hudson* test, whether the solicitation
13 curfew is more extensive than necessary to serve such interest.

14 For these reasons, the Court declares the Town's
15 solicitation curfew set out in 5.04.080(A)(4) violates the
16 protections of the First and Fourteenth Amendments to the
17 United States Constitution. The enforcement of same is
18 permanently enjoined.

19 Any need for clarification or further explanation?

20 MR. FIELDING: Not from the plaintiff, Your Honor.

21 MR. CONNOLLY: We do have one question, Your Honor.

22 The relief that was requested in Aptive's Second Amended
23 Complaint was to enjoin the daylight enforcement of the curfew.
24 So is that section you referenced enjoined at all times, or is
25 it just during the daylight hours, through dusk?

1 THE COURT: The curfew is set out in that section. If
2 what you're asking is, is the Court saying that this is going
3 to be a dawn-to-dusk curfew? That's beyond my authority. The
4 entire curfew is enjoined.

5 MR. CONNOLLY: So we don't have a curfew at all?

6 THE COURT: You -- right.

7 MR. CONNOLLY: Okay.

8 THE COURT: All right. Judgment will enter
9 permanently enjoining the curfew provision.

10 Is there anything further that we need to address?

11 MR. PERFREMENT: Not for plaintiff, Your Honor.

12 MR. CONNOLLY: Nothing, Your Honor.

13 THE COURT: Okay.

14 Thank you very much, counsel. That will conclude this
15 matter. As soon as the judgment is entered, the case will be
16 closed. We'll stand in recess.

17 (Recess at 11:22 a.m.)

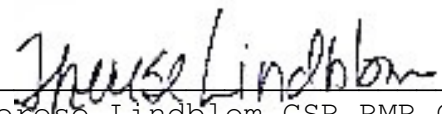
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19 REPORTER'S CERTIFICATE

20 I certify that the foregoing is a correct transcript from
21 the record of proceedings in the above-entitled matter.

22 Dated at Denver, Colorado, this 4th day of April,
2018.

23


Therese Lindblom, CSR, RMR, CRR

24

25